



February 14, 2002

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-0701

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158605.

The Texas Department of Human Services (the "department") received a request for five categories of information related to APC Home Health. You advise that you are withholding reports, records, and working papers used or developed in an investigation under chapter 142 under section 142.009(d) of the Health and Safety Code, pursuant to a previous determination issued in Open Records Letter No. 2001-5348 (2001). You claim that some additional requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

As an initial matter, subsections 552.301(a) and (b) of the Public Information Act provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Further, section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written

comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. This office did not receive the request for a decision within the ten business day period mandated by section 552.301(a), and, as you acknowledge, did not receive the above-listed information within the fifteen business day period mandated by section 552.301(e).

Because the department failed to comply with the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. This office has long held that a compelling reason to withhold information exists, sufficient to overcome the section 552.302 presumption of openness, where the information at issue is made confidential by another source of law or affects third party interests. *See* Open Records Decision Nos. 26 (1974), 150 (1977). The application of section 552.101 is such a compelling reason.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that certain information in the state forms titled Statement of Licensing Violations and Plan of Correction is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release this state form; however, you contend the department must withhold the names of certain individuals contained within the forms in Attachment B under section 142.009(d)(5). Based on your representations and our review of the submitted information, we conclude that the department must withhold the names of most of the agency's representatives under section 142.009(d)(5). However, one of the highlighted signatures belongs to the executive director/president of the agency, who you represent is the owner. A "home and community support services agency" is defined as "a person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location." *Id.* § 142.001(12). "Person" is defined as "an individual, corporation, or association." *Id.* § 142.001(21). As a corporation or association, a home and community support services agency is a person who provides home health, hospice, or personal assistance services for pay or other consideration. We believe that the owner of an agency is a person who falls within the purview of the "home and community support services agency" definition. Thus, the name of an agency's owner is not protected under section 142.009(d)(5) and must be released because the section

requires the release of information identifying a home and community support services agency from the state form.

You also contend that some information in the state forms is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA governs access to medical records. Open Records Decision No. 565 at 7 (1990). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the information in the state forms that the department may release only in accordance with the MPA.

Further, you claim that the information in Attachment C and the criminal history record information in Attachment D constitute information provided to the department by the healthcare facility as required under section 142.004 of the Health & Safety Code, and that these records are confidential under section 142.004(d). Section 142.004(d) provides:

Information received by the department relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant is confidential and may not be disclosed to the public.

Health & Safety Code § 142.004(d). Based on your representations and our review of the submitted information, we agree that the information in Attachment C and the criminal history record information in Attachment D are confidential and must be withheld by the department under section 552.101 of the Government Code in conjunction with section 142.004(d) of the Health and Safety Code.

Finally, you contend that the social security numbers in Attachment D may be confidential under section 552.101 in conjunction with federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open

Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in Attachment D are confidential under section 405(c)(2)(C)(viii)(I) and, are, therefore excepted from public disclosure under section 552.101 on the basis of the federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers in Attachment D, the department should ensure that the social security numbers were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the department must withhold the names of the individuals highlighted in the submitted state forms in Attachment B under section 552.101 in conjunction with section 142.009(d)(5) of the Health and Safety Code, with the exception of the name of the agency's owner. We have marked the information within the submitted state forms that the department may release only in accordance with the MPA. The department must also withhold the information in Attachment C and the criminal history record information in Attachment D pursuant to section 142.004(d). In addition, prior to releasing any social security numbers in Attachment D, the department should ensure that these social security numbers were not obtained or are maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii). The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

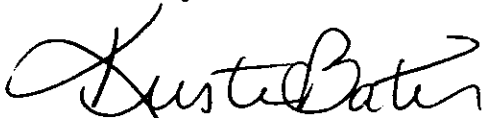
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristin Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 158605

Enc. Submitted documents

c: Ms. Veronica Atkinson
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(w/o enclosures)